BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The parties to a cause, on appeal, are limited to the contentions made in their pleadings or raised on the trial of the cause, and courts of appeal are likewise limited to the consideration of the same questions.

Helvering v. *Tex-Penn Co.*, 300 U. S. 481, 498.

Hormel v. *Helvering*, 61 S. Ct. Rep. 719, 721.

Nelson v. *Colegrove*, 354 Ill. 408, 414.

Wollenberger v. *Hoover*, 346 Ill. 511, 538.

Finefrock v. *Kenova Mine Car Co.*, 22 Fed. (2d) 627, 634 (4th C. C. A.).

Roof v. *Rule*, 348 Ill. 370, 375.

Fisher v. *Burks*, 274 Ill. 363, 367.

Butler v. *Miller*, 208 Ill. 231, 235.

II.

The Supreme Court of Illinois based its decision entirely upon a proposition of fact and a theory not presented in the pleadings of any of the parties, or raised or litigated at the trial, or presented or argued in the briefs of the parties filed in the Supreme Court.

See Argument.

III.

The Supreme Court of Illinois, by reversing the decree of the trial court and rendering final judgment against petitioner, based upon a proposition of fact and a theory which had not been presented in the pleadings of the parties or at the trial, nor in the briefs filed in the Supreme Court, violated the due process clause of the Fourteenth Amendment to the Federal Constitution.

Saunders v. *Shaw*, 244 U. S. 317, 319.
Helis v. *Ward*, 308 U. S. 365, 370.
Castle v. *Persons*, 117 Fed. 835, 843 (8th C. C. A.).
Union Cemetery Association v. *Kansas City*, 252 Mo. 466, 161 S. W. 261, 274.

ARGUMENT.

I.

The Parties to a Cause, on Appeal, Are Limited to the Contentions Made in Their Pleadings or Raised on the Trial of the Cause, and Courts of Appeal Are Likewise Limited to Consideration of the Same Questions.

There are few doctrines so universally established as the fundamental rule that courts of review will only consider and render decisions upon the contentions of the parties made at the trial of the cause, within the scope of their pleadings, and will not consider questions, either of fact or law, which were not presented to the trial court.

The reason for this rule is well stated by this Court in the case of *Hormel* v. *Helvering,* 61 S. Ct. Rep. 719, at page 721:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding."

Under the exceptional circumstances of the Hormel case, this Court ruled that the Circuit Court of Appeals properly gave consideration to Section 22a of the Revenue Act, in determining the taxpayer's liability, although said Section was not relied on before the Board of Tax Appeals. However, it is to be noted that this Court remanded the case to the Board of Tax Appeals in order to give the taxpayer an opportunity to offer evidence on the new issue raised, the Court saying, at page 723:

> "But the Board of Tax Appeals neither found the facts nor considered the applicability of 22a in the light of the Clifford case. Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue, however remote may be his chance to take his case out of the Clifford rule."

In *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, this Court refused to consider a contention made by the Commissioner of Internal Revenue, because such contention was not made or relied upon in the courts below. This Court said, at page 498:

> "The parties presented their respective claims to the board and to the lower court on the theory that, if neither Tex-Penn nor its stockholders as such received any cash from Transcontinental, the transaction would be within Sec. 202(b). The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies. His failure earlier to present the question leaves this court without the assistance of decision below. His petitions for these writs did not present

> the question to this court. We are not called on to consider the construction of Sec. 202(b) now proposed."

The appellate jurisdiction of the Supreme Court of Illinois is subject to this identical limitation.

Thus, in *Nelson* v. *Colegrove*, 354 Ill. 408, it was sought to establish a trust as to certain bonds. On appeal, with respect to a contention that the bonds were obtained by fraud and misrepresentation, the court, at page 414, says:

> "The contention that the bonds were obtained from the plaintiff in error by fraud and misrepresentation cannot be sustained. The petition contains no such allegation. In the absence of a charge of fraud and misrepresentation in the petition, there was no basis for evidence to that effect. The circuit court did not consider the question; the Appellate Court found that no such issue was raised and the question is not presented to this court."

Again in *Wollenberger* v. *Hoover*, 346 Ill. 511, the Supreme Court of Illinois refused to consider a new contention sought to be made by complainant, saying, at page 538:

> "Inasmuch as he has by his bill of complaint and by his own evidence made his claim in the lower court and confined it to the relief aforesaid, he cannot be allowed in this court to make other and different claims than he made in the lower court. It is elementary that a complainant in a chancery suit cannot make one case by his bill in the lower court and on a review by a reviewing court be allowed to make another and entirely different one. This court has frequently so declared, and we have also expressly declared that 'this court reviews a case presented to the trial court and does not sit to try issues presented for the first time in this court.' " (Citing cases.)

As will be demonstrated under point II hereof, the Supreme Court of Illinois, contrary to its own long estab-

lished rule relating to the scope of review on appeal, of its own volition considered and decided the litigation here involved upon an issue not pleaded nor litigated on the trial, nor raised on the appeal to that Court.

II.

The Supreme Court of Illinois Based Its Decision Entirely Upon a Proposition of Fact and a Theory Not Presented in the Pleadings of Any of the Parties, or Raised or Litigated at the Trial, or Presented or Argued in the Briefs of the Parties Filed in the Supreme Court.

The pleadings of respondents consist of an amended answer and counterclaim, which will be found at pages 54 to 62 of the Record, and are outlined in the petition for certiorari.

To summarize very briefly, the only contentions made by respondents in their pleadings are:

> *First*, that an agreement was made between respondents and petitioner, that respondents were to have two years to repay petitioner the amount petitioner had paid to Mabel Durbin under the foreclosure decree, and upon such payment respondents were to receive a conveyance of the property from petitioner; that the conveyance from respondents to petitioner was intended to be a mortgage. (R. 59.)
>
> *Second*, that the deed from respondents to petitioner, not having been properly acknowledged, and the property being respondents' homestead and having a value of less than $1,000.00, no estate whatsoever passed by said deed to petitioner. (R. 61.)

Petitioner's reply to the amended answer and his answer to the counterclaim joined issue on these contentions.

On appeal, respondents urged the same contentions made in their pleadings. Thus, as stated in their brief:

> "Defendants George W. Durbin and Minnie L. Dur-

bin (respondents) rely upon two propositions for a reversal of the decree as to them:

First: That the deed to petitioner was intended to be, and was, a mortgage.

Second: That there was no valid conveyance, release or abandonment of the homestead estate of sixty-seven acres." (R. 304.)

With respect to the first proposition, respondents state in their brief:

> "It must be admitted that the testimony is very conflicting upon the point, that is, 'Was there an agreement and understanding among petitioner and respondents that the deed was only security for the payment to Mabel Durbin by petitioner the amount due on the mortgage?' " (R. 304.)

And again:

> "And while it is true that respondents have the burden of proving that the deed they made to petitioner is but a mortgage, and was so intended by the parties, that does not mean that there shall be absence of conflict in the testimony." (R. 308.)

Such were the pleadings of respondents, and their contentions on appeal to the Supreme Court of Illinois.

A careful reading of the opinion of the Supreme Court of Illinois, appearing at pages 334 to 348 of the Record, will suffice to show that said Court decided the case upon a proposition of fact and theory not raised in the pleadings, or urged or relied upon on appeal to that Court, namely, that petitioner was guilty of fraud, unfairness and overreaching in the transaction whereby he received the conveyance of the property in question from respondents.

Said Court holds that at the time of the conveyance to petitioner, the relationship between respondents and petitioner was that of mortgagor and mortgagee; that "while it is not legally impossible for a mortgagee to acquire the mortgagor's equity of redemption, yet such a transfer

or agreement to transfer is one that is jealously regarded by a court of equity and which will be strictly scrutinized for evidence of oppression, fraud or unfairness." (R. 345.) The Court then quotes from the case of *Alexander* v. *Rodriguez*, 12 Wall. 323, as follows:

> "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que* trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee, was, in all things, fair and frank and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals and the protection due to those whose property is thus involved, require that such should be the law." (R. 345-346.)

The Court then states: "When this rule of law is applied to the transaction we are considering, only one result is possible." (R. 346.) The Court proceeds to review petitioner's conduct in connection with the transaction, and finds that he did not pay an adequate consideration for the property, and that he was guilty of fraud, unfairness and overreaching. (R. 346.) In concluding its review of petitioner's conduct, the Court says: "A careful exam-

ination of his (petitioner's) entire testimony which would unduly prolong this opinion would disclose other frailties. It is enough to say that he has not sustained the burden of showing that degree of fairness which the law requires of one who attempts to secure this mortgagor's equity of redemption for himself." (R. 347.)

It is respectfully submitted that the foregoing summary and quotations from the Court's opinion leave no doubt that the basis of said Court's decision was the fraud, unfairness and overreaching found by the said Court with respect to petitioner. A reading of the entire opinion will serve to emphasize this conclusion.

Since the issue of fraud and unfair dealing was not raised or relied upon by respondents at any time in the proceedings, it is natural that the Supreme Court found no assistance in respondent's brief and argument, in arriving at its decision in favor of respondents. Indeed, the position respondents took, in several instances, was in direct contradiction to the view taken by the Court. Thus, as shown above, respondents conceded in their brief that the rule of law applicable to the case placed upon them the burden of proof to establish that the deed they delivered to petitioner was intended as a mortgage. (R. 304.) However, in the view taken by the Supreme Court, the burden of proof was shifted to petitioner, the Court stating in its opinion: "It is enough to say that he (petitioner) has not sustained the burden of showing that degree of fairness which the law requires of one who attempts to secure this mortgagor's equity of redemption for himself." (R. 347.)

Again, on the question of the adequacy of the consideration paid by petitioner for the property, the Court holds that "the rule requires that the mortgagee show that he has paid for the property what it was worth." (R. 346.) One of the two contentions urged by respondents in their

pleadings, and at the trial, and on appeal, was that the value did not exceed $1,000. (See counterclaim, R. 61.) Respondents' counterclaim further discloses that petitioner paid for the property more than twice the amount claimed by respondents to be the value thereof. (R. 60.) The Supreme Court of Illinois, in its effort to avoid the implications of the contention as to the value of the property made by respondents, is forced into making an unfortunate statement, which is clearly contrary to law. The Court says: "The evidence also shows that no matter what the parties may have thought about the value of the land it was proved within less than the normal period of redemption to be worth a quarter of a million dollars." (R. 346-347.) The Court refers to petitioners' testimony as to the value of the lands as of March 30, 1939. (R. 156.) The Supreme Court was thus forced, in determining whether petitioner paid an adequate consideration for the property at the time he received the conveyance, to consider evidence of the value of the property as of a date approximately 20 months subsequent to the time of the conveyance.

Further substantiation of the view that the Court, in deciding the case, entirely ignored the contentions of the parties, is found in the fact that the Court's opinion does not cite or refer to a single case cited by either party in the briefs filed in the Supreme Court of Illinois, as authority for their respective positions.

In short, under pleadings, evidence and decision below, and assignments of error, briefs and arguments on appeal, the sole primary issue was whether there was an enforceable oral agreement that the deed, though admittedly entirely valid, should operate as a mortgage, with a right of redemption in grantors, the burden of proving the oral agreement, by their own admission, resting on grantors. The reviewing court, without aid from record below or as-

signments of error, briefs or arguments on appeal, determined that the grantee was guilty of fraud, oppression and unfair dealing, making the deed to him invalid from the beginning, and putting on the grantee the burden of proving not only that there was no oral agreement, but also that the execution and delivery themselves were free from fraud.

III.

The Supreme Court of Illinois, by Reversing the Decree of the Trial Court and Rendering Final Judgment Against Petitioner, Based Upon a Proposition of Fact and a Theory Which Had Not Been Presented in the Pleadings of the Parties or at the Trial, Nor in the Briefs Filed in the Supreme Court, Violated the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

It must be borne in mind that on the issues made by the parties, and litigated in the trial of this case, the trial court found for petitioner. In Illinois great weight is given to the chancellor's findings.

A typical expression of the view of the Illinois Supreme Court in that respect is found in the case of *Hall* v. *Pittinger*, 365 Ill. 135, where the Court says, at page 135:

> "The chancellor who tried the case received the evidence in open court, saw the witnesses and heard them testify. Under these circumstances we will not disturb the findings of the chancellor unless manifestly and palpably wrong; and this is true even though we might be inclined to find otherwise had we been placed in his stead upon the trial of the suit."

In deciding the case upon issues not raised or litigated by the parties, obviously the Supreme Court of Illinois could not have had, and did not have the benefit of the views of the chancellor as to such issues. Where the issue upon which the case is decided is that of fraud of one

of the litigants, it would seem especially important for a court of review to have the benefit of the trial court's views before it on the appeal of the case, and the absence of such findings on that issue by the chancellor, who is in the best possible position to evaluate the testimony of witnesses, becomes very significant and serious.

Basically, the reason for the rule announced by the cases cited under point I, relating to scope of review by appellate courts is founded upon the due process clause of the Fourteenth Amendment. It is axiomatic that due process requires notice and an opportunity to be heard. In this case petitioner has been deprived of an opportunity to be heard on the issue upon which the Supreme Court of Illinois decided the case against him.

There are, as might be expected, relatively few authorities involving civil cases, in which the claim is made that due process was denied by action of courts of review. This Court, however, has recognized and enforced the principle contended for by petitioner, on several occasions.

Thus, in the case of *Helis* v. *Ward*, 308 U. S. 365, this Court granted certiorari on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record, and on a theory which had never been tried by the litigants. The Court's statement to this effect is found on page 370.

In case of *Saunders* v. *Shaw*, 244 U. S. 318, plaintiff in error contended that his rights under the due process clause of the Federal Constitution had been violated by the decision of the Supreme Court of Louisiana. It appeared that on the trial of said case, which was a suit to enjoin the collection of a drainage tax, evidence with respect to the physical condition of the property sought to be taxed was ruled by the trial court to be immaterial. Judgment was entered in the trial court for defendants. On appeal to the Supreme Court of Louisiana the judgment was first affirmed.

However, on rehearing, the judgment was reversed, the court holding that the land involved was low and marshy, and had not been benefited or drained, and could not be, under existing conditions. Final judgment was entered in the Supreme Court of Louisiana, enjoining the assessment against the land.

Plaintiff in error, an intervenor in the case, who held some of the drainage district bonds, sought a review of the judgment of the Supreme Court of Louisiana. In reversing the decision and judgment of the Supreme Court of Louisiana, this Court, through Justice Holmes, states the question involved, and the decision of the court thereon, as follows, at page 319:

> "He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

It is submitted that this case is direct authority for petitioner's contention here.

In *Castle* v. *Persons,* 117 Fed. 835, Judge Sanborn, of the Circuit Court of Appeals for the Eighth Circuit, in his concurring opinion of reversal of the District Court's opinion, very forcibly and aptly states the rule applicable to the case at bar. At page 843, he says:

> "That due process of law without which parties may not be deprived of their property gives to them an opportunity to be heard respecting the justice of the judgment sought. It gives notice of the issue to be determined before it is tried. One may not bring suit upon one cause of action and recover upon another, nor may he go to trial upon one defense and sustain a judgment in his favor upon another and inconsistent defense. He may not deny in his answer the plaintiff's averments of a good cause of action, and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter no notice of which was given by the pleadings or by the course of the trial until the plaintiff had introduced substantially all his evidence. Proofs without averments and averments without proofs are equally unavailing." (citing cases.)

In the case of *Union Cemetery Association* v. *Kansas City,* 252 Mo. 466, 161 S. W. 261, the Supreme Court of Missouri, in refusing to consider a question not presented to the trial court, in its opinion, at page 274, says:

> "In answer to that request, we will state that, while there seems to be much merit in this request, as incidentally appears from this record, yet no such question was presented by the pleading or established by the evidence or considered by the trial court, and for that reason, however desirous we might be to afford the relief thus prayed, yet it is perfectly apparent that, under the present condition of the pleadings (and evidence) in the case, we have no jurisdiction to so do. Such a holding would clearly deprive the cemetery company of its property without due process of law, within the meaning of both the state and federal Constitutions."

Petitioner asks this Court to reverse the judgment and decision of the Supreme Court of Illinois, with directions to remand this cause to the Circuit Court of Fayette County. There respondents, if they desire, may reframe their pleadings to encompass the issue of fraud, which the Supreme Court of Illinois apparently felt should have been the issue in the case. Petitioner will then have an opportunity of meeting such issue, if raised. A denial of that opportunity is a denial of due process.

In the case of *Finefrock* v. *Kenova Mine Car Co.*, 22 Fed. (2d) 627, cited under point I, the Circuit Court of Appeals for the Fourth Circuit, after refusing to consider a new issue, attempted to be raised in that court, said, at page 634:

> "We think that the proper action on this branch of the case is to remand it without final decision to the District Court for further proceedings, in which, if the parties desire it, the pleadings may be amended, additional evidence may be taken, and the defendants may have full opportunity to present their defense. There is abundant authority for the proposition that the appellate court has power, without determining and disposing of a case, to remand it to the lower court for further proceedings, if the case has been tried on a wrong theory, or the record is not in condition for the appellate court to decide the questions presented, with justice to all the parties concerned." (citing cases.)

The relief we are asking was granted by this Court in *Saunders* v. *Shaw* and *Hormel* v. *Helvering*, cited above. It was also granted by the Circuit Court of Appeals for the Fourth Circuit in *Finefrock* v. *Kenova Mine Car Co.*, and for the Eighth Circuit in *Castle* v. *Persons*, both cited above. It should be noted that it is apparent from the opinions of this Court, in both the *Hormel* and *Saunders* cases, that this Court felt that the litigant who complained of a violation of his constitutional rights had very little chance of ultimate success in the litigation, yet this Court felt impelled to permit the litigant an opportunity to be heard.

In the instant case petitioner is confident that he will be able to successfully meet the issues of fraud, unfairness and overreaching, if such issues are raised by respondents in subsequent proceedings. All petitioner seeks is to be given an opportunity to do so.

Respectfully submitted,

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